INDEX

CITATIONS

Cases:

IN THE

Supreme Court of the United States

No. 71-1304

OCTOBER TERM, 1972

JAMES B. BRADLEY, JR., BYRON H. JOHNSON, ROBERT T. ODELL, JR., AND WILLIAM JAMES HELLIESEN,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR AMICI CURIAE

INTEREST OF SEVEN WOMEN PRISIONERS AS AMICI CURIAE

This amici curiae brief is filed, with the consent of counsel for the parties, on behalf of seven women prisoners presently confined at the Federal Reformatory for Women, Alderson, West Virginia. All were convicted and sentenced before May 1, 1971, the effective date of the Comprehensive Drug Abuse Preven-

tion and Control Act of 1970. All have served one-third or more of their sentences.

Having exhausted their administrative remedies with the United States Board of Parole, a suit on behalf of these seven women prisoners has been filed in the United States District Court for the Southern District of West Virginia. The suit is styled *Irene Alvarado, et al.* v. *Virginia McLaughlin, Warden, et al.*, Docket Number 1399.

As of June 30, 1972, the Federal Reformatory for Women had 554 residents. Of these, 127 had been sentenced for narcotic offenses (commitments under the Narcotic Addict Rehabilitation Act of 1966 not included).

The sentences of the latter group range from 5 to 25 years in length. Thirty-eight women were serving sentences considered to be nonparolable and 89 were serving parolable sentences. Of the women considered not eligible for parole, 32 had been sentenced before May 1, 1971, and 6 after that date. Of the women considered eligible for parole, 26 had been sentenced before May 1, 1971, and 63 after that date. (Appendix, *infra*, pp. 1a-3a.)

Although their suit in the Southern District of West Virginia is not a class action, the amici are representative of all thirty-eight women at the Reformatory serving administratively classified nonparolable sentences, as well as of other prisoners throughout the country serving similar sentences. The figures cited above illustrate the administrative difficulties the Bureau of Prisons has encountered in classifying sentences as parolable or nonparolable since the new drug act became effective on May 1, 1971. In his Memoran-

dum for the United States in response to the petition for certiorari in this case the Solicitor General pointed out that the question of eligibility for parole "comprehends all persons in custody who, regardless of the date of sentencing, were convicted of violating the old narcotic laws, which did not permit parole" and he agreed that the "inconsistency" between various circuits on this question calls for resolution by this Court (pp. 4-5). The lack of uniformity in administrative treatment demonstrated by the statistics furnished by the Warden of the Reformatory for Women (*supra*) equally calls for authoritative resolution of the question of parole eligibility of all persons imprisoned for violating the narcotics laws in effect prior to May 1, 1971. It is the position of amici that all such persons are eligible for parole, regardless of whether they were sentenced before or after that date.

ARGUMENT

I

All federal prisoners convicted of offenses against the narcotic laws of the United States are now eligible for parole, in accordance with applicable parole statutes, because Congress by repealing 26 U.S.C. 7237(d) has eliminated the only bar to such parole eligibility. This result is mandated by MORRISSEY V. BREWER, No. 71-5103, decided by this Court on June 29, 1972.

Several of the Courts of Appeals and District Courts have considered the effect upon persons convicted of federal narcotic offenses of the specific savings provision, § 1103(a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Public L. No. 91-513, 84 Stat. 1236, and the effect of the general savings provision, 1 U.S.C. 109. None of these cases, however, has presented in clear and unclouded form

the question the amici present: did the repeal of 26 U.S.C. 7237(d) open the way for consideration for parole of persons convicted and sentenced before May 1, 1971, for offenses committed by them against the narcotic laws of the United States?

Between the two ends of the spectrum, that is, as between those persons who committed offenses after May 1, 1971, and are now clearly eligible for parole and those persons who committed offenses, were sentenced, and were in prison on May 1, 1971, there are a multiplicity of variations centering around the magic date, May 1, 1971. The amici join the Solicitor General in asking this Court to settle all these problems, as the United States Board of Parole should have done long ago. The amici contend that the only rational rule that can be declared in this situation is that *all* offenders against the narcotic laws of the United States are now eligible for consideration for parole in accordance with the parole statutes of the United States.

The amici think that the following cases support their position: *United States* v. *McGarr*, — F.2d — (C.A.7, No. 72-1108, April 28, 1972); *United States* v. *Fithian*, 452 F.2d 505 (C.A.9 1971); *United States* v. *Stephens*, 449 F.2d 103 (C.A.9 1971); *United States* v. *Pregerson*, 448 F.2d 404, 406 (C.A.9 1971); *United States* v. *King*, 335 F. Supp. 523, 555 (S.D. Cal. 1971).

Although clearly distinguishable on their facts, the amici recognize that the United States is relying upon the following cases as supporting a contrary position: *United States* v. *Bradley*, 455 F.2d 1181 (C.A.1 1972), the case now before this Court; *United States* v. *Fioto*, 454 F.2d 252 (C.A.2 1972); *United States* v. *Wooden*, 453 F.2d 1258 (C.A.2 1971); *United States* v. *Caraballo*, 334 F. Supp. 843 (S.D. N.Y. 1971, aff'd

without opinion October 7, 1972, by the Second Circuit); *Page* v. *United States,* 459 F.2d 467 (C.A.10 1972); *United States* v. *Robinson,* 336 F. Supp. 1386 (W.D. Wis. 1972).

There may be other recently reported cases; there most surely are other unreported cases.

These cases, though, have been superseded by the decision of this Court in *Morrissey* v. *Brewer,* No. 71-5103, handed down on June 29, 1972. The Court, in an opinion by Mr. Chief Justice Burger, reviewed "the function of parole in the correctional process", saying (Slip Op. 6):

> . . . Rather than being an *ad hoc* exercise of clemency, parole is an established variation on imprisonment of convicted criminals. Its purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed. It also serves to alleviate the costs to society of keeping an individual in prison. The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence.

In light of this function, the Chief Justice said, "Parole arises after the end of the criminal prosecution, including imposition of sentence" (*id.,* 9). No member of the Court expressed disagreement with this analysis.

This conclusion—"Parole arises after the end of the criminal prosecution"—answers fully the question much discussed in the lower courts as to the limits of a "prosecution" within the meaning of the specific savings provision contained in § 1103(a) of the new

drug act. That provision preserves "prosecutions for any violation of law occurring prior to" May 1, 1971. *Morrissey* makes clear that parole is a matter separate from and unconnected with "prosecution".[1] Thus parole does not extinguish prosecutions which the savings clause preserves.

This construction of the specific savings clause should be dispositive of the question, for it is a recognized principle of statutory construction that a specific provision prevails over a general one.

Even if the general savings provision contained in 1 U.S.C. 109 is to be considered, *Morrissey* again provides the answer. That section preserves "any penalty, forfeiture or liability incurred under" a repealed statute. In *Morrissey* the Court characterized parole as "an established variation on imprisonment of convicted criminals" (*supra*, p. 5). As a "variation on imprisonment" it is a "penalty, forfeiture or liability" within the meaning of 1 U.S.C. 109. Thus again, parole does not extinguish any penalty, forfeiture or liability which the savings clause preserves.

II.

Equal protection of the law requires that the new drug act be construed to grant consideration for parole to all federal narcotic offenders.

When considering legislation challenged as violative of the guarantee of equal protection of the laws under the Fifth and Fourteenth Amendments, this Court has looked to the purpose of the legislation in resolving the constitutional issue. *See, e.g., Goesaert* v. *Cleary,*

[1] See also *Berman* v. *United States,* 302 U.S. 211, 212 (1937) ("Final judgment in a criminal case means sentence. The sentence is the judgment"); *Korematsu* v. *United States,* 319 U.S. 432, 435 (1943).

335 U.S. 464 (1948) (social and moral purposes attributed to statute providing for sexual classification in employment); *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 366 U.S. 582 (1961) (secular purpose attributed to Sunday closing law).

A prohibition against these amici prisoners being considered for parole eligibility solely because of the date on which their offenses were committed creates an indefensible and irrational classification of prisoners. Under such a classification, two prisoners of the same sex, same age, same background, same criminal record, and most importantly with the same potential for rehabilitation are treated differently, solely because of the dates of their offenses, or convictions, or sentences, or some similarly arbitrary and irrelevant criterion. One such prisoner with a fifteen-year sentence may be granted parole after serving one-third of her sentence, or five years, but another must remain in prison for the full fifteen years less good time and other statutory deductions, or for about ten years.

Watson v. *United States*, 439 F. 2d 442 (C.A. D.C. 1970), supports this view. The defendant in *Watson* had been convicted of two prior narcotic offenses and was, therefore, ineligible under Title II of the Narcotic Addict Rehabilitation Act of 1966, 18 U.S.C. 4251(f), for rehabilitative treatment. Another person with only one such conviction would have been eligible. The Court of Appeals for the District of Columbia Circuit held that to the extent that the Act denied qualified persons eligibility for updated rehabilitation programs, it violated the equal protection embodied in the Due Process Clause of the Fifth Amendment.

An analogy is found in the history of the federal "jail time" statute, 18 U.S.C. 3568. Before its enact-

ment in 1960, the federal courts often tacitly gave credit for the time offenders had spent in custody before formally beginning service of their sentences. However, in the absence of statutory authority, the courts did not credit with jail time an offender who had been given a mandatory minimum sentence. To correct this injustice, Congress required the Attorney General to give credit for jail time "... where the statute requires the imposition of a mandatory minimum sentence." Congress made no provision, however, for the automatic award of jail time credit against non-mandatory sentences. It may have been assumed that the courts would provide such credit as a matter of course, but the legislative history is silent on that point. Thus, when courts sometimes failed to provide jail time credit, a new and unforeseen discrimination developed: persons sentenced for less serious offenses, those not carrying a mandatory minimum, were denied the jail time credit that was automatically accorded to persons convicted of more serious offenses. *Stapf* v. *United States*, 367 F.2d 326, 328 (C.A. D.C. 1966). Congress corrected this new injustice in 1966 by amending § 3568 to require the Attorney General to credit all offenders with jail time. The 1966 amendment became effective in September, 1966. By its terms it had prospective effect only, thereby creating an additional discrimination between persons sentenced before the effective date and those sentenced after that date. Recognizing that the history of the 1960 and 1966 amendments demonstrated that the discrimination was unintentional, the District of Columbia Circuit in *Stapf* v. *United States, supra,* found the discrimination could easily be corrected.

> This is not a case, we reiterate, where Congress removed part of an evil but disclaimed action on the rest. This is a case, rather, where Congress

> acted as to the only evil that required legislative action, and assumed that in all other instances equivalent relief would be provided by the courts. In such a context the court acts unlawfully when it effectuates rather than avoids an arbitrary classification. 367 F.2d at 329-330.

See also, *Dunn* v. *United States*, 376 F.2d 191 (C.A. 4 1967); *United States* v. *Pratt*, 276 F. Supp. 80, 82 (D. N.J. 1967); *cf.*, *Shelley* v. *Kraemer*, 334 U.S. 1 (1948).

The *Stapf* viewpoint of unconstitutional discrimination was applied by the Fourth Circuit in *Cole* v. *North Carolina*, 419 F.2d 127 (C.A. 4, 1969). Originally, North Carolina had denied credit for jail time pending appeal. In 1969 the legislature amended the statutes so as to grant credit for such jail time, but the enactment operated prospectively only from its effective date. Cole had been convicted and appealed before that date. The Attorney General of North Carolina, "commendably", said the court, suggested that the case be remanded to the district court with directions to give the jail time credit. "The justification, the Attorney General states, is to avoid unlawful discrimination between the defendants tried subsequent to the enactment of the credit statutes and those tried prior to their enactment." *Id.* at 128. The court agreed and granted the relief the Attorney General had suggested.

The rule of *Cole* was applied in *Mott* v. *Dail*, 337 F. Supp. 731 (E.D. N.C. 1972). The question involved was whether the prisoner was entitled to credit on his sentence for time spent in custody prior to trial. North Carolina decisional law was to the effect that he was not entitled to such credit. In ordering that the credit be given, the Court said (at 732):

> The decision in this case is governed by the rationale in *Cole* v. *North Carolina*, 419 F.2d 127

(4th Cir. 1969). In that case Cole sought credit for time spent in custody *pending appeal*. Under the provisions of North Carolina General Statute § 15-186.1 a person tried after ratification of the statute is entitled to credit for time spent in custody pending appeal. Cole was tried prior to the enactment of the statute. However, the State of North Carolina conceded and the Fourth Circuit Court of Appeals held that when the statute was made prospective only an unlawful discrimination arose against persons tried prior to the ratification of the statute. The court ordered that credit be given.

The situation in the instant case is analogous to *Cole*. North Carolina General Statute § 15-176.2, ratified July 19, 1971, allows credit for time spent in custody *prior to trial*. The statute applies only to cases tried after the date of ratification. Petitioner was tried prior to enactment of the statute. Applying the reasoning underlying *Cole*, it is clear that petitioner is being subjected to an invidious discrimination and that he is entitled to credit for all time spent in custody prior to trial. See, *Withers* v. *North Carolina*, No. 71-1111 (4th Cir. Oct. 20, 1971).

If the repeal of 26 U.S.C. 7237(d) is to be construed so as to avoid the constitutional question of equal protection, then the reasoning of *Stapf*, *Cole*, and *Mott* is persuasive. An intent to practice unlawful discrimination cannot be attributed to Congress. As in the enactment and amendment of provisions for crediting jail time (18 U.S.C. 3568, discussed above), the repeal of §7237(d) cannot be regarded as a case where Congress "removed part of an evil" (that is, the denial of parole eligibility for persons committing offenses on or after May 1, 1971) "but disclaimed action on the rest" (that is, the evil of a denial of parole eligibility for

persons who had committed offenses before that date). *Stapf* v. *United States, supra*, p. 8.

Moreover, the legislative history of the 1970 drug act contains several references to a broad legislative intent in the repeal of § 7237(d). Referring to the recommendations made by the President's Advisory Commission on Narcotics and Drug Abuse (the Prettyman Commission), the House Committee said:

> The Commission recommends that the penalty provisions of the Federal narcotics and marihuana laws which now prescribe mandatory minimum sentences and prohibit probation or parole be amended to fit the gravity of the particular offense so as to provide a greater incentive for rehabilitation.
>
> Action. As discussed earlier in this report, . . . *elimination of the prohibition against probation and parole of narcotic offenders, is accomplished by this bill.* H.R. Rep. No. 91-1444, 91st Cong., 2d Sess. (1970); 3 U.S. Cong. & Admin. News (1970) 4584-4585. [Emphasis added.]

Similarly, the House Committee, responding to recommendations by the President's Commission on Law Enforcement and Administration of Justice, said:

> State and federal drug laws should give a large enough measure of discretion to the courts and correctional authorities to enable them to deal flexibly with violators. . . .
>
> Action. The penalty structure set forth in the reported bill provides a flexible system of penalties for Federal offenses, in accordance with . . . this recommendation. . . . H.R. Rep. No. 91-1444, *supra*, 3 U. S. Cong. & Admin. News (1970) 4587-4588; see also, The President's Commission on Law Enforcement and Administration of Justice,

> The Challenge of Crime in a Free Society, 141-143, 222-224 (1967); *Id.*, Task Force Report, Corrections, 86.

The key phrases in the above passages, "incentive for rehabilitation" and "discretion . . . to correctional authorities", show that Congress, in repealing § 7237(d), intended to map out the treatment for all federal narcotic offenders, past, present, and future. The whole purpose of the repeal of § 7237(d) was to provide "flexibility" and "discretion" in the rehabilitative phase of the criminal process, a purpose which has also been incorporated into both the Model Penal Code and the proposed new Federal Criminal Code. Model Penal Code § 1.01 and § 1.02 (1962); National Commission on Reform of Federal Criminal Laws, Final Report (1971), § 3401.

The Court of Appeals for the Ninth Circuit, in *United States* v. *Stephens*, 449 F.2d 103 (1971), has cogently summarized the purpose of the 1970 drug act, while applying it in a way that avoids problems of equal protection (at 106):

> The new Act reflects the current view that probation should be available for these [narcotic] offenses. Allowing it here permits a salutary tempering of the arbitrariness which otherwise would result from hewing to a cut-off date in transition from old to new law and an approach to evenhanded dispensation of justice not otherwise available. We fail to see how the public interest would be served by straining for a statutory construction that would achieve a contrary result.

The same reasoning applies to parole. The amici submit, in summary, that this Court should construe the repeal of § 7237(d) so as to preserve its constitu-

tionality and at the same time provide an "evenhanded dispensation of justice" to all federal prisoners convicted of narcotic offenses.

CONCLUSION

For the reasons herein stated, the amici submit that the Court should construe the repeal of 26 U.S.C. 7237(d) as a removal of the prior prohibition against parole as to all imprisoned narcotic offenders convicted of offenses which occurred before the repeal.

Respectfully submitted,

FRED M. VINSON, JR.
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800 17th Street, N. W.
Washington, D. C. 20006

August 1972.

APPENDIX

UNITED STATES DEPARTMENT OF JUSTICE
BUREAU OF PRISONS

FEDERAL REFORMATORY FOR WOMEN
ALDERSON, WEST VIRGINIA 24910

July 28, 1972

PROFESSOR WILLIAM RITZ
Washington & Leé University
Lexington, Virginia

Dear Professor Ritz:

We are submitting the following information per your request:

As of July 26, 1972, we have a total of 71 in the NARA program.

On June 30, 1972, of the 554 residents at Alderson, 127 of them had narcotic offenses, 38 were not eligible for parole, 89 were eligible to meet the Parole Board.

From July 1, 1972, through July 26, 1972, 14 new residents have been committed to the institution with narcotic offenses with sentences ranging from 1 year to 15 years.

The following people entered the institution with no parole and their status has now changed:

18059-170 Betsey, Wetahanna Jo
Sentenced March 25, 1970—North Oklahoma
5 years—no parole
Sentence changed June 1972
5 years—Eligible for parole

18060-170 Gordon, Flora
Sentenced March 12, 1970
5 years—no parole
Sentence changed May 17, 1972
5 years—Eligible for parole Oct. 28, 1971

18159-170 Francis, Elizabeth Ann
Sentenced June 5, 1970—N. Oklahoma
8 years—no parole
Sentence changed May 17, 1972
5 years—Eligible for parole Nov. 15, 1971
Met July 1972 Board

18566-170 Isaza, Maria Victoria
Sentenced April 23, 1971—E. New York
9 years—no parole
Sentence changed June 6, 1972
4 to 6 years—YCA 5010(b)
Met July 1972 Parole Board

18687-170 Isaza, Ruth Estela
Sentenced April 23, 1971—East New York
7½ years—no parole
Sentence changed June 6, 1972
4 to 6 years—YCA 5010(b)
Met July 1972 Parole Board

18651-170 Johnson, Mary Lee
Sentence June 23, 1971—E. Louisiana
5 years—no parole
Sentence changed—5 years 4208(a)(2)
Has made parole for October 1972

Residents Eligible for Parole

Sentenced before May 1971	—	26
Sentenced after May 1971	—	63
Total		89

Not Eligible for Parole

Sentenced before May 1971	—	32
Sentenced after May 1971	—	6
Total		38

We are attaching a list of residents with parole and a list of residents with no parole.

If you need additional information, please let us know.

Very truly yours,

VIRGINIA W. MCLAUGHLIN
Virginia W. McLaughlin
Warden

Enc.
cc: Mr. Fred M. Vinson, Jr.